

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

76-2165

In The United States Court of Appeals
For The Second Circuit

JOSEPH DEL VECCHIO,

Petitioner-Appellant,

-against-

THE UNITED STATES OF AMERICA,

Respondent-Appellee.

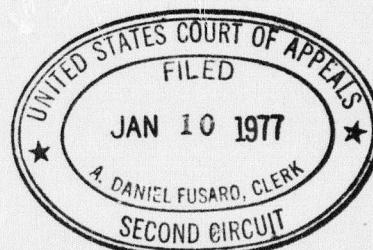
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On Appeal From A Memorandum And Order Of
The United States District Court
For The Southern District
Of New York

APPELLANT'S APPENDIX

SAXE, BACON & BOLAN, P.C.

Attorneys for Petitioner-
Appellant
39 East 68th Street
New York, New York 10021
(212) 472-1400



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DOCKET ENTRIES

DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	S	OTHER	NUMBER	DEBT	YR.	NUMBER
208-01	76	4716	10	22	76	2	510	1					0860		76	4716

PLAINTIFFS

DEFENDANTS

DEL VECCHIO, JOSEPH

THE UNITED STATES OF AMERICA

BEST COPY AVAILABLE

28 U.S.C. S2255

CAUSE

petitioner was not accorded his rights under
 FRCP 11 at time of acceptance & entrance to
 plea of guilty to indict.#73.CR 1099.)
 TO VACATE SENTENCE.

ATTORNEYS

Saxe, Bacon & Bolan P.C.
 39 East 68th St.
 New York, NY 10021
 472-1400

JULY 1

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16-CIV-4716

DEL VECCHIO, JOSEPH

VS: THE UNITED STATES OF AMERICA

PG.

DATE	NR.	PROCEEDINGS	
			DUFFY, J
10-22-76	1.	Filed Petitioner's Affidavit in support of application pursuant to 28 U.S.C. §2255 in the nature of a writ of habeas corpus, by Michael Rosen.	
10-22-76	2.	Filed Petitioner's Memorandum of Law.	
10-29-76 (3)		Filed petitioner's affdvt. and notice of motion for an order pursuant to 28 U.S.C. sec. 2255 setting aside and vacating the sentence, etc...	
10-29-76 (4)		Filed petitioner's memorandum of law in support of motion.	
11-15-76 (5)		Filed Order-- for the reasons stated, the application for relief under Section 2255 of Title 28 is therefore denied. It is so ordered. DUFFY, J. (p/n)	
12-08-76 (6)		Filed Petitioner's notice of appeal to USCA from the Memorandum and Order dated 11-12-76.. Copiested: Joseph Del Vecchio and U.S. Atty., SD of N.Y.	
12-09-76 (7)		Filed notice that the record on appeal has been certified and transmitted to the USCA this day.	

NOTICE OF APPEAL

3a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

JOSEPH DEL VECCHIO, :
Petitioner, : 76 CIV 4716
- against - : (KTD)
UNITED STATES OF AMERICA, : NOTICE OF APPEAL
Respondent. :
-----X

SIRS:

PLEASE TAKE NOTICE that the Petitioner, Joseph Del Vecchio, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Memorandum and Order of the Honorable Kevin Thomas Duffy, Judge of the United States District Court for the Southern District of New York, dated November 12, 1976, and from each and every part thereof.

Dated: New York, New York
November 19, 1976

Yours, etc.

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner
39 East 68th Street
New York, New York 10021
(212) 472-1400

by


A Member Of The Firm

TO: JOSEPH DEL VECCHIO
#76701
P.O. Box 1000
Lewisberg, Pennsylvania 17877

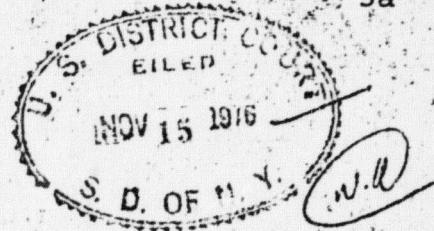
HON. ROBERT FISKE
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

CLERK OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK
40 Centre Street
Foley Square
New York, New York 10007

ORDER APPEALED FROM

5a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



JOSEPH DEL VECCHIO,

Petitioner : ORDER

-against- : 76 Civ. 4716

UNITED STATES OF AMERICA,

Respondent : -----x

APPEARANCES:

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner
By: Roy M. Cohn, Esq.
Michael Rosen, Esq.
Ronald Poepplein, Esq.
Of Counsel

HON. ROBERT B. FISKE
United States Attorney, S.D.N.Y.
Attorney for Respondent

KEVIN THOMAS DUFFY, D.J.

The application having been made under Section 2255, Title 28, it is alleged that this Court was in error in failing to advise the defendant as to the minimum sentence which he could serve. See United States v. Tramunti, 73 Cr. 1099. It may be that I did not advise the defendant of the minimum sentence possible. It was my conclusion

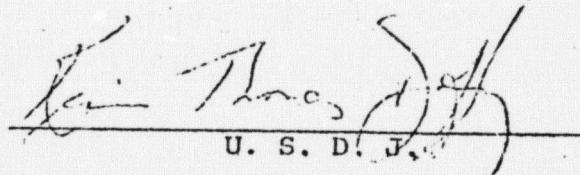
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that the defendant was responsible for the importation of two kilos of pure heroin per week for a period of years. A discussion of probation in such a situation was needless. The other matters which the defendant raises are without merit.

The application for relief under Section 2255 of Title 28 is therefore denied.

IT IS SO ORDERED.



A handwritten signature in black ink, appearing to read "K. Thomas, U.S. D.J.", is written over a horizontal line. The signature is somewhat stylized and includes a small drawing of a scale.

Dated: New York, New York
November 17, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION
UNDER 28 U.S.C. Sec. 2255

7a

JOSEPH DEL VECCHIO,

Petitioner, :

76 Civil 4716
(KTD)

- against -

NOTICE OF MOTION

THE UNITED STATES OF AMERICA,

Respondent. :

X

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Michael Rosen, Esq., duly sworn to on the 21st day of October, 1976, the record of proceedings contained in 73 Cr. 1099, and all prior pleadings and proceedings heretofore had herein, the undersigned shall move this Court at such date, time and place as the Court may direct at the Courthouse, 40 Centre Street, New York, New York for an order pursuant to 28 U.S.C. §2255, setting aside and vacating the sentence imposed herein, allowing the petitioner to plead anew to the charges contained in Indictment No. 73 Cr. 1099, or, in the alternative, for an evidentiary hearing on such issues, for the immediate release of the petitioner; and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 21, 1976

Yours, etc.,

SAXE, BACON & BOLAN, P.C.
Attorneys for Petitioner
39 East 68th Street
New York, New York 10021
(212) 472-1400

By S. MICHAEL ROSEN
A Member of the Firm

TO: HON. ROBERT B. FISKE
United States Attorney for
The Southern District of New York
1 St. Andrew's Plaza
New York, New York 10007

AFFIDAVIT IN SUPPORT OF MOTION

8a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-x

JOSEPH DEL VECCHIO,

Petitioner, : *[Redacted]*

- against -

THE UNITED STATES OF AMERICA, :
:

AFFIDAVIT

Respondent. :

- x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

MICHAEL ROSEN, being duly sworn, deposes and says:

I am a member of the firm of Saxe, Bacon & Bolan, P.C., attorneys for petitioner, and submit this affidavit in support of petitioner's application pursuant to 28 U.S.C. §2255 in the nature of a writ of habeas corpus.

The petitioner was originally charged in a multi-count indictment with possession and the intent to distribute heroin in violation of 21 U.S.C. §§173, 174, 812, 841(a)(1) and 841(b)(1)(a). On January 14, 1974, the petitioner entered a plea of guilty to Counts 1, 11, 12, 13, 23, 24 and 27 of the indictment 73 Cr. 1099, which counts charged conspiracy to possess, facilitate and distribute narcotics and substantive counts relative to such possession, and facilitation. (For the convenience of the Court, a copy of petitioner's plea before the Honorable Kevin Duffy is annexed as Exhibit A). At the time of the plea, petitioner was represented by Gino E. Gallina, Esq., and the government was represented by United States Attorney Paul J. Curran and Assistant United States Attorney Walter M. Phillips. On May 20, 1974, the petitioner was sentenced to fifteen (15) years imprisonment with three (3) years special parole to commence

on completion of his imprisonment.

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It is the petitioner's contention that the sentence therein should be vacated and he be permitted to withdraw his plea of guilty based on the failure of the judge to fully comply with Rule 11 of the Federal Rules of Criminal Procedure (hereinafter FRCrP. 11) which states in part that:

"Before accepting a plea of guilty or nolo contendere, this Court must address the defendant personally in open court and inform him of, and determine that he understands the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum provided by law, if any, and the maximum possible penalty provided by law; . . ." F.R.Cr.P.11(c) (1).

This is the present statement of Rule 11. At the time petitioner entered his plea, the Rule required that the defendant understand "the consequences of his plea." As appears herein, the petitioner was not accorded his rights under the Rule.

Specifically, petitioner urges such relief based on his not being advised as to the outer parameters of the potential penalties he faced by virtue of his plea as well as the minimum mandatory punishment for which he was liable.

The petitioner is presently incarcerated in the Federal Penitentiary at Lewisburg, Pennsylvania. He has been there since July of 1973 when he was sentenced to three (3) years imprisonment on another matter by Judge Inzer Wyatt, United States District Judge, Southern District of New York. Since this original sentence has more than been served, should this Court grant the instant application, we request that the petitioner be immediately released, as prior to his incarceration, he had been free on bail on both matters.

At the time of the petitioner's plea, the Court 10a ascertained that there was a factual basis for the plea and attempted to explain the possible penalties for the petitioner. The Court informed the petitioner that he faced incarceration for fifteen (15) years with an additional penalty of fifteen (15) years if a second offender information was filed, as well as potential fine of \$25,000. The petitioner was not advised of the minimum mandatory penalty to which he was exposed under 21 U.S.C. §§173 and 174, nor of the mandatory special parole for which he would be liable at the end of his sentence pursuant to 21 U.S.C. §841(a)(1) and (b)(1)(a).

". . . a defendant is entitled to plead anew if a United States District Court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *McCarthy v. United States*, 394 U.S., 459, 463-464, 89 S.Ct. 116 22 L.Ed.2d 418 (1969)

Under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §401(b)(1)(b) and §841 (b)(1)(B), prior to the acceptance of a guilty plea, the trial judge must inform the defendant of the mandatory term of special parole. As is evident from the January 14, 1974 transcript, no such information was imparted to the petitioner. As more clearly set forth in the accompanying memorandum of law, this omission requires that the sentence be vacated, the petitioner be released, and be allowed to withdraw his plea and plead anew. At the very least, an evidentiary hearing should be held on these issues.

WHEREFORE, it is respectfully requested that this application be granted in all respects.

5 | MICHAEL ROSEN

Sworn to before me this

21st day of October, 1976

RONALD F. POEPPELIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-4503069
Qualified in Nassau County
Commission Expires March 30, 1977

5)

PLEA OF PETITIONER-APPELLANT ANNEXED AS EXHIBIT TO MOTION

11a-

1 MP

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA :

6 versus :

7 CARMINE TRAMUNTI et al., :

73 Cr 1099

8 Defendants. :

9 : Plea of DelVecchio
-----x

10 New York, N. Y.

11 January 14, 1974 - 11:25 a.m.

12 Before

13 HON. KEVIN THOMAS DUFFY,

14 District Judge

15 APPEARANCES:

16 PAUL J. CURRAN, Esq.,
17 United States Attorney for the Southern District
18 of New York

19 WALTER M. PHILLIPS, JR., Esq.,
20 Assistant United States Attorney

21 GINO GALLINA, Esq.,
22 Attorney for Defendant DelVecchio

23 -----

24

25

1 MP

2

2 MR. GALLINA: Good morning, your Honor.
3 As your Honor knows, I represent the defendant
4 Joseph DelVecchio. I have had long and protracted conversa-
5 tions with him about whether or not he intended to stand
6 trial. It is his desire, after, also, conversations that
7 I have had with Mr. Phillips, to plead guilty to Counts 1,
8 11, 12, 13, 23, 24 and 27.

9 It is my understanding that the remaining counts,
10 3 and 4, at the time of sentencing, would be dismissed at
11 the recommendation of the Government.

12 MR. PHILLIPS: At the request of defense counsel,
13 without any opposition by the Government.

14 THE COURT: All right, Mr. DelVecchio --

15 MR. GALLINA: Your Honor, may I have the defendant's
16 wife here?

17 THE COURT: Surely.

18 (Mrs. DelVecchio enters the robing room.)

19 MR. GALLINA: Your Honor, I have also indicated to
20 the defendant in the conversations that I have had with Mr.
21 Phillips concerning the desire of the Government to call him
22 as a witness. I have already indicated to your Honor and to
23 the Government that Mr. DelVecchio does not intend to testify
24 in behalf of any defendant or on behalf of anybody in the
25 case, and I have discussed this with all the attorneys and

2 other defendants who might be concerned, and they have in-
3 dicated to me that they will not call him as a witness.

4 I have also indicated to him the Government has
5 stated previously on the record to me that they also do not
6 intend to call him as a witness, and he wanted to have that
7 understanding before he went ahead with his plea.

8 Again, your Honor, it is my respectful --

9 MR. PHILLIPS: There is one other thing, I think,
10 if you want to take it up now, what we have discussed down-
11 stairs, and that is waiver of the question of timeliness of
12 the Government to file a prior offender information, since
13 Mr. Gallina indicated he was not waiving, and we consent to
14 this, either the question of identity, whether in fact Mr.
15 DelVecchio is in fact the individual involved, or the validity
16 of the underlying conviction, but it is the Government's
17 intention to charge Mr. DelVecchio as a prior offender,
18 based on his plea of April 1973 to charges under 843(b),
19 Title 21, which involves the use of a wire facility to
20 promote a narcotics conspiracy.

21 MR. GALLINA: I would waive that portion that Mr.
22 Phillips so indicated, the timeliness of service of notice,
23 which Mr. Phillips understands to be prior to the sentencing
24 or verdict.

25 MR. PHILLIPS: The entry of a plea.

1 MP

4

2 THE COURT: Do you have the thing, the notice, now?

3 MR. PHILLIPS: No, your Honor.

4 MR. GALLINA: No, your Honor.

5 THE COURT: All right.

6 MR. GALLINA: It is the defendant's desire to
7 withdraw his plea as to those counts I have already mentioned
8 and plead guilty at this time.

9 BY THE COURT:

10 Q Mr. DelVecchio, have you read the indictment?

11 A Yes, sir.

12 Q Have you gone through it with your attorney?

13 A Yes, sir.

14 Q I understand that you now wish to plead guilty; is
15 that correct?

16 A Yes, sir.

17 Q Do you wish the indictment, those counts read to
18 you at this time?

19 A What did you say, your Honor?

20 Q Do you want me to read those counts?

21 A No. I have read them.

22 Q All right. Before I can accept a plea of guilty,
23 it is necessary for me to be sure that you are acting
24 voluntarily, with a complete understanding of your rights,
25 and that you understand the consequences of your plea and

1 MP

2 that in fact you are guilty.

3 A Yes, sir.

4 Q Do you know that if you continue you not guilty
5 plea, you would be entitled to a speedy trial and that the
6 Government would have to confront you with witnesses? Do
7 you understand that?

8 A Yes, sir.

9 Q Do you have an understanding that at that trial
10 you would be presumed innocent until such time as the
11 testimony and exhibits in evidence would prove that you were
12 guilty beyond a reasonable doubt?

13 A Yes, sir.

14 Q Do you understand that you would be presumed
15 innocent?

16 A Yes, sir.

17 Q Do you know that at such a trial you would have a
18 right to call witnesses on your own behalf?

19 A Yes, sir.

20 Q Do you know that if you wanted me to, I would
21 issue subpoenas for those witnesses to appear?

22 A Yes, sir.

23 Q All right. Do you understand that the first count
24 of this indictment is basically a conspiracy count, charging
25 you with conspiring to traffic in various narcotic drugs? Do

1 MP

2 you understand that?

3 A Yes, sir.

4 Q And the other counts to which you are pleading
5 basically charge you with either transporting or facilitating
6 the transportation and sale and purchase of certain narcotic
7 drugs: do you understand that?

8 A Yes, sir.

9 Q Do you know that for each of the counts in the
10 indictment, you could be sentenced to a term of fifteen
11 years, and if this second offender information is filed that
12 they are talking about, it could be a possible maximum of
13 thirty years? Do you understand that?

14 A Yes, sir.

15 Q Do you understand you could also be fined?

16 A Yes, sir.

17 Q I believe the fine is --

18 MR. PHILLIPS: \$20,000, your Honor.

19 Q (Continuing) -- \$20,000?

20 A Yes, sir.

21 Q Have any threats or promises been made to you
22 to induce you to plead guilty?

23 A No, sir.

24 MR. PHILLIPS: It is \$25,000, your Honor. I was
25 thinking of the old law.

1 MP

2 THE COURT: \$25,000.

3 MR. GALLINA: You understand that it is \$25,000?

4 DEFENDANT DELVECCHIO: Yes, sir.

5 Q Has anyone suggested to you in any way that there
6 is any understanding about what kind of a sentence you would
7 get?

8 A No, sir.

9 Q Has anyone made any prediction to you as to what
10 you would get?

11 A No, sir.

12 Q In fact, did you commit the offenses to which you
13 are pleading guilty?

14 A Yes, sir.

15 THE COURT: All right. Let me have the indictment,
16 please.17 Q Did you agree with others to facilitate and dis-
18 tribute and possess with intent to distribute the narcotic
19 drugs?

20 A Yes, sir.

21 THE COURT: What is the next one?

22 MR. GALLINA: 11.

23 Q In November of 1970, did you have possession or
24 did you conceal or facilitate the transportation and con-
25 cealment of a quarter kilogram of heroin?

1 MP

2 A Yes, sir.

3 Q Do you want to tell me what happened?

4 A I had possession of a quarter kilogram of heroin.

5 Q You did?

6 A Yes, sir.

7 THE COURT: What is the next count?

8 MR. GALLINA: 12.

9 Q All right. Again, in November of 1970, did you
10 have possession of another quarter kilogram of heroin?

11 A Yes, sir, your Honor. I had possession of it.

12 MR. GALLINA: Next is 13.

13 Q Once again, did you have possession in November
14 of 1970 of a third quarter-kilogram of heroin?

15 A Yes, sir, your Honor. I had possession of it.

16 MR. GALLINA: Number 23, your Honor.

17 Q And about July 1972, did you have possession or
18 did you attempt to distribute three kilograms of heroin?

19 A Yes, sir, your Honor. I had possession.

20 Q Count 24 is the next one. In October did you have
21 possession of another three kilograms of heroin?

22 A Yes, sir. I had possession of it.

23 MR. GALLINA: Count 27, your Honor, the last count.

24 Q In May 1973, Mr. DelVecchio, did you have posses-
25 sion of another three kilograms of heroin?

2 A Yes, sir, your Honor. I had possession.

3 Q Under all the circumstances, do you still wish to
4 plead guilty to these counts?

5 A Yes, your Honor.

6 THE COURT: Mr. Gallina, do you know of any reason
7 whatsoever why the Court should not accept the plea of
8 guilty?

9 MR. GALLINA: No. I know of no reason.

10 THE COURT: Mr. Curran, do you know of any reason
11 why the Court should not accept the plea of guilty of Mr.
12 DelVecchio?

13 MR. CURRAN: No, your Honor.

14 THE COURT: All right. I find that the plea is made
15 knowledgeably and voluntarily and has a basis in fact and
16 contains all of the elements of the crime as charged and there-
17 fore will be accepted.

18 Mr. DelVecchio, I believe a pre-sentence report
19 was made up for you a short time ago.

20 DEFENDANT DELVECCHIO: Yes, your Honor.

21 THE COURT: Have you been at West Street since
22 you were sentenced down there?

23 MR. GALLINA: Yes, your Honor. He has also been
24 committed to the Federal Penitentiary at Sandstone, Minnesota
25 for a period of time and was on his way being transferred to

1 MP

10

2 Pennsylvania, Allenwood, so there should be probation or
3 parole recommendations et cetera that are at those institutions
4 which I would ask your Honor to incorporate into any pre-
5 sentence report.

6 THE COURT: All right. Do you understand the
7 request, Mr. DelVecchio, that your counsel just made?

8 DEFENDANT DelVECCHIO: Yes, your Honor.

9 THE COURT: Basically, in order for me to intel-
10 ligently sentence you, I want to find out what you did prior
11 to going to prison, and I want to find out how you have
12 reacted to prison. It makes a difference, a big difference.

13 DEFENDANT DelVECCHIO: Yes; I know.

14 THE COURT: And I would not do it without your
15 consent.

16 DEFENDANT DelVECCHIO: Definitely, sir.

17 MR. GALLINA: Not only that, your Honor. I would
18 waive any necessity for preparing a new probation report,
19 since he has been in prison continuously since the last
20 probation report.

21 THE COURT: All right.

22 MR. GALLINA: Thank you very much, your Honor.

23 THE COURT: I can't set a date until I get all
24 that information. Let me just sign this so that the marshal
25 can have his paper work in proper order.

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10 [a]

2 MR. GALLINA: Your Honor, could the marshal allow
3 the defendant one minute with his wife, outside?

4 THE COURT: Surely.

5 MR. GALLINA: Thank you, your Honor.

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